IN THE

Supreme Court of the United States

October Term, 1953

No. 243

ANDREW BROS. OF CALIFORNIA, a co-partnership composed of Fred Andrews and Victor C. Andrews,

Petitioner,

vs.

CENTRAL PRODUCE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX

PAGE

Petition for Writ of Certiorari 1

Summary and statement of matters involved 2

Statement disclosing basis of jurisdiction of Supreme Court 5

The questions presented 6

Reasons relied upon for allowance of writ 7

Brief in Support of Petition for Writ of Certiorari 9

I.

Opinions of the courts below and of the Secretary of Agriculture 9

II.

Jurisdiction 10

III.

Statement of facts 10

IV.

Specifications of error 12

V.

Summary of argument 13

Argument 14

Point A. In a proceeding under the Perishable Agricultural Commodities Act, the filing of a counter-claim, seeking affirmative relief, within nine months after the cause of action set forth therein arose, is a jurisdictional prerequisite to the granting of affirmative relief thereon 14

Decisions under the Interstate Commerce Act 18

Decisions under the Court of Claims Act 21

PAGE

Point B. Where a governmental agency, acting in a quasi-judicial capacity, interprets the law under which it acts and its own rules, and consistently follows such interpretation for a long period of time, a reviewing court should follow the interpretation of said agency where the same is not contrary to the law or public policy..... 23

Point C. Jurisdiction not being dependent upon diversity of citizenship, but upon federal law, the law of the forum (Tennessee) should not govern..... 27

Point D. Central waived the right to repudiate or rescind the contract by accepting carloads of fruit, protection against loss, and by changing the terms of the contract.... 30

Conclusion 33

TABLE OF AUTHORITIES CITED

CASES — PAGE

Agricultural Case No. 1442 (name not disclosed), 6 Ag. Dec. 231 24

Agricutural Case No. 2765 (names not disclosed), 10 Ag. Dec. 531 24

Agricultural Case No. 2789 (names not disclosed), 10 Ag. Dec. 662 24

Andrews v. Central, Ag. Dec. 403 24

Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 89 L. Ed. 1700 25

Boyles v. Kingsbaker Bros. Co., 5 Cal. 2d 68 32

California Fruit Exchange v. Joseph Rothenberg, 7 Ag. Dec. 986 24

Clark v. Wheeling, 53 Fed. 495 32

Deitrick v. Greaney, 309 U. S. 190, 84 L. Ed. 694 29

D'Oench, etc. v. Federal Deposit Ins. Corp., 315 U. S. 447, 86 L. Ed. 956 29

Finn v. United States, 123 U. S. 227, 31 L. Ed. 128 21

Ford v. United States, 116 U. S. 213, 29 L. Ed. 608 21

Gehl's Guernsey Farms, Inc. v. Midfield, etc., 8 Ag. Dec. 187 24

Gilliland & Co. v. San Antonio Commission Co., 2 Ag. Dec. 492 23

Harding v. York, 142 Fed. 228 32

Henry H. Cross Co. v. Texhoma Oil, 32 F. 2d 42 32

Horowitz Brothers v. H. Rothstein & Sons, Inc., and H. Rothstein & Sons, Inc. v. Horowitz Brothers, et al., 2 Ag. Dec. 67 23

J. W. Eillison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S. E. 391 32

John Deere Plow Co. v. Shellabarger, 140 Tenn. 123, 203 S. W. 756 32

John Service, Inc. v. Goodnow-Pearson Co., 242 Mass. 594, 136 N. E. 623 32

PAGE

L. Gillarde Co .v. Joseph Martinelli & Co., Inc., 169 F. 2d 70.... 25
Lubet Produce v. Gordon Scharping, 5 Ag. Dec. 570..... 24
Mancusco v. L. Gillarde Co., 61 A. 2d 677..... 25
McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360..... 32
O'Brien v. Western Union Tel. Co., 113 F. 2d 539..... 28
Pennsylvania R. Co. v. Miller, 124 F. 2d 160.....20, 24
Phillips v. Grand Trunk Western R. Co., 236 U. S. 662, 59 L. Ed. 774, 33 S. Ct. 444..... 20
Powers, Kenneth G., v. Schley Bros., 5 Ag. Dec. 617..... 23
Reynolds v. Palmer, 21 Fed. 433..... 32
Ricks Fertilizer Co. v. M. Dunn & Co., 5 Ag. Dec. 1946..... 23
Rushton & Co. v. Hamilton & Cooper, 10 Ag. Dec. 1377..... 24
Sechler, Edna M., v. Tom Black, 9 Ag. Dec. 729..... 24
Stewart v. Simon, 163 S. W. 1135..... 24
The Schuman Co. v. Frank B. Constantine Co., 10 Ag. Dec. 201 24
Trio Fruit Co. v. Keim Produce Co., 10 Ag. Dec. 157..... 24
United States v. Wardwell, 172 U. S. 48, 43 L. Ed. 360..... 21
United States, etc. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. Ed. 914..... 18
Wm. Hedberg Inc. v. Edison Vegetable Growers, Inc., 10 Ag. Dec. 1000 24

EXECUTIVE ORDERS

Executive Order 9322 (8 Fed. Reg. 3807)..... 16
Executive Order 9334 (8 Fed. Reg. 5423)..... 16
Executive Order 9392 (8 Fed. Reg. 14783)..... 16
Executive Order 9577 (10 Fed. Reg. 8087, 10 Fed. Reg. 2209, 11 Fed. Reg. 224)..... 16

STATUTES

PAGE

Administrative Procedure Act (60 Stats. 237) 16
Court of Claims Act, Sec. 10 (Rev. Stats. 1069) 21
Interstate Commerce Act, Sec. 16 ..... 18, 20
Judicial Code, Sec. 128 10
Judicial Code, Sec. 240 10
Perishable Agriculture Commodities Act (46 Stats. 531):
Sec. 2 15
Sec. 5 ..... 15, 17
Sec. 6 15
Sec. 7 15
Sec. 7(c) 16
Sec. 15 ..... 16, 22, 27
Sec. 47.3 16
Sec. 47.6 17
Sec. 47.8 17
Rules of the United States Supreme Court, Rule 38, par. (5)(b) 6
Tennessee Code, Sec. 8745 22
Tennessee Code, Sec. 8746 22
Tennessee Code, Sec. 8749 22
United States Code, Title 5, Sec. 516(a) to (c) 5
United States Code, Title 5, Sec. 1001 16
United States Code, Title 7 (1940 Ed.), Sec. 499(a); Supp. IV, Sec. 499(b) 16
United States Code, Title 28, Sec. 1254 ..... 6, 10
United States Code, Title 28, Sec. 1291 ..... 5, 10
United States Code Annotated, Title 7, Sec. 499 15
United States Code Annotated, Title 7, Sec. 499(a) to (r) 2, 5
United States Code Annotated, Title 7, Sec. 499(c) 5
United States Code Annotated, Title 7, Sec. 499(f), (g) 10

TEXTBOOKS	PAGE
8 Agricultural Decisions, p. 403	3, 9
47 American Jurisprudence, Sec. 276, p. 460	32
10 Federal Register, p. 13769	5
Mechem on Sales, Sec. 1399	32
Page on Contracts, Sec. 1492	31

IN THE

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No. .....

ANDREW BROS. OF CALIFORNIA, a co-partnership composed of Fred Andrews and Victor C. Andrews,

Petitioner,

vs.

CENTRAL PRODUCE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Andrews Bros. of California, a co-partnership composed of Fred Andrews and Victor C. Andrews, respectfully petitions this Honorable Court to issue a writ of certiorari in the above-entitled proceeding to review a final decision of the United States Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, in favor of the respondent Central Produce Company and against petitioner, Andrew Bros. of California.

Summary and Statement of Matters Involved.

This is a reparation proceeding which originated before the Secretary of Agriculture (hereinafter referred to as "the Secretary") under the Perishable Agricultural Commodities Act of 1930, as amended (7 U. S. C. A., Sec. 499(a) to (r)).

Andrew Bros. of California, a co-partnership composed of Fred Andrews and Victor C. Andrews, hereinafter referred to as "Andrews," filed a complaint with the Secretary on December 26, 1945, seeking a reparation order against Central Produce Company (hereinafter referred to as "Central") requiring Central to pay damages sustained by Andrews by reason of the failure of Central to take delivery of 24 cars of oranges and grapefruit, pursuant to the terms of a written contract. [R. pp. 2-17; p. 130, Finding 24.]

Central filed an answer with the Secretary on October 7, 1946, in which it admitted entering into the contract but contended that Andrews did not ship the kind or quality of fruit provided for in the contract and that it had sustained damages by reason thereof. On the same day Central filed a counterclaim seeking affirmative relief against Andrews, said affirmative relief consisting of the recovery of (1) damages in the sum of $5,476.37 by reason of Andrews not shipping the kind or quality of fruit provided for in the contract; also (2) the sum of $8,400.00, being the unapplied portion of the down payment on the purchase price. [R. pp. 56-112, and p. 130, Finding 24.]

A hearing was held before an Examiner appointed by the Secretary.

Thereafter Thomas J. Flavin, Judicial Officer appointed by the Secretary, made a reparation order under which he held that Andrews was entitled to recover damages for loss sustained on the ninth, tenth, eleventh and twelfth cars shipped under the contract, being the cars which Central refused to accept, said loss amounting to $2,-450.58, but that Central was entitled to offset, as against said damages, the loss which it had sustained on six of the first eight cars of fruit shipped, being the cars that it accepted, said loss amounting to $2,340.63, and also was entitled to a return of the unused portion of the deposit amounting to $7,200.00, but that said counterclaim not having been filed within nine months after the cause of action set forth therein arose, that Central could not recover affirmative relief on its counterclaim and was limited to an offset or recoupment of its loss on Andrews' claim for damages. Flavin made certain findings of fact, conclusions of law and an order, all of which are reported in 8 Agricultural Decisions, page 403.

Thereafter and on August 22, 1949, Andrews appealed from said reparation order and filed the statutory bond [R. p. 114] and on August 24, Central appealed therefrom. [R. p. 115.] Both appeals were taken to the United States District Court for the Middle District of Tennessee, Nashville Division.

Both appeals came on regularly for hearing before said Court on September 5, 1951, and a trial *de novo* was had in said court as provided by the Perishable Agricultural Commodities Act. The District Court concurred in the findings of the Secretary (Thomas J. Flavin, Judicial Officer) and approved and adopted said findings as its own. [R. p. 118.]

The District Court adopted the conclusions of law of the Secretary with one exception, that was, the Court was of the opinion that Central should have been allowed to assert its counterclaim for affirmative relief. [R. p. 130, Conclusion 1.]

The District Court further concluded:

(a) That since the Perishable Agricultural Commodities Act makes no provision with reference to counterclaims the Court should follow the Tennessee law, which permits the filing of a counterclaim and awarding judgment thereon, and that the bringing of the original suit saves from the operation of the statute of limitation all claims of the defendant which were proper subjects for setoff or counterclaim. [R. 132, Conclusions 7 and 8.]

(b) Central's repudiation of the contract was justified because Andrews substantially breached the contract with respect to the first 8 carloads of fruit; Central's rejection of the 4 carloads shipped and in transit prior to its repudiation was in violation of the "acceptance final" term of the contract and the loss occasioned by Andrews on these cars in the sum of $2,450.58 should be allowed as an offset against any recovery allowed Central on its counterclaim. [R. p. 133, Conclusion 9.]

(c) That Central was entitled to judgment for the loss sustained on the first 8 cars shipped, amounting to $2,340.63, plus the balance of the amount advanced, to-wit, $7,200.00, plus an additional sum of $1,000.00 as attorney's fees, and that Andrews was entitled to a credit thereon for the loss sustained on the 4 cars shipped and rejected, to-wit, $2,450.58. [R. p. 133, Conclusion 10.]

Judgment was entered in accordance with Conclusion 10. [R. p. 134.]

Andrews appealed to the United States Court of Appeals for the Sixth Circuit from the judgment of the District Court and filed the statutory cost bond [R. p. 135.] and on appeal contended that the findings of the District Court did not support the conclusions of law and that the judgment was against law.

The Court of Appeals affirmed the judgment of the District Court by a *per curiam* opinion. [R. p. 149.]

A petition for rehearing was filed on April 28, 1953 [R. p. 151] and the same was denied on May 14, 1953. [R. p. 167.]

Statement Disclosing Basis of Jurisdiction of Supreme Court.

The Secretary of Agriculture derived his jurisdiction of this proceeding under the Perishable Agricultural Commodities Act of 1930, as amended (7 U. S. C. A., Secs. 499(a) to (r)).

Thomas J. Flavin, Judicial Officer of the Secretary of Agriculture (the officer signing the reparation order in this case), acted pursuant to powers delegated to him by the Secretary of Agriculture under authority of Title 5, United States Code, sections 516a to 516c. (Vol. 10, Fed. Reg., p. 13769.)

The United States District Court for the Middle District of Tennessee, Nashville Division, was vested with jurisdiction on appeal by virtue of the provisions of the Perishable Agricultural Commodities Act of 1930, as amended. (7 U. S. C. A., Sec. 499(c).)

The jurisdiction of the United States Court of Appeals for the Sixth Circuit was derived from the provisions of Title 28, United States Code, Section 1291.

The jurisdiction of this Court to review this case is provided by Title 28, United States Code, Section 1254.

Where a case involves "an important question of federal law which has not been, but should be, settled by this Court," or where a Court of Appeals decision is in probable conflict with applicable decisions of this Court or where it is necessary to secure uniformity of federal decisions, this Court has jurisdiction to grant certiorari to review said case and decision. [Supreme Court Rule 38, par. (5)(b).)

The Questions Presented.

1. Did the District Court, on appeal in a trial *de novo,* have jurisdiction to render a money judgment based on a counter-claim seeking affirmative relief, where said counter-claim was filed with the Secretary of Agriculture more than nine months (the statutory period for filing petitions before the Secretary) after the cause of action set forth therein arose?

2. Should the District Court and the Court of Appeals have followed the interpretation by the Secretary of Agriculture of the law under which he acts and the rules prescribed by the Secretary?

3. Should the District Court have followed the law of Tennessee (law of the forum) in a proceeding arising under Federal law, where jurisdiction of the Federal Court is not based on diversity of citizenship and the rule of the Federal Courts is different from the rule in Tennessee?

4. Did Central waive the right to repudiate or rescind the contract for the purchase of said oranges and grapefruit?

Reasons Relied Upon for Allowance of Writ.

1. The decision of the Court of Appeals holding that the District Court, on appeal in a trial *de novo,* had jurisdiction to render a money judgment based on a counter-claim seeking affirmative relief where the counter-claim was filed more than nine months after the cause of action set forth therein arose, involves an important question of Federal law which has not been, but should be, settled by this Court.

2. The decision as to jurisdiction involves a question arising under Federal law and was decided in a way which is in probable conflict with applicable decisions of this Court, in cases arising under statutes similar to the Perishable Agricultural Commodities Act.

3. For the purpose of securing uniformity of federal decisions:

(a) The Secretary of Agriculture held that he did not have jurisdiction to make a reparation order on a counter-claim seeking affirmative relief where the counter-claim was filed more than nine months after the cause of action set forth therein arose, whereas the Court of Appeals for the Sixth Circuit held that the District Court, on appeal in a trial *de novo,* had jurisdiction to render a money judgment based on said counter-claim.

(b) The Circuit Court of Appeals for the Fifth Circuit recognized the rule that a cause of action set forth in a counter-claim could not be the basis for affirmative relief, where it was filed after the time allowed by law had elapsed for the filing of an original action on the cause of action which is set forth in the counterclaim.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of,

this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket as *"Andrews Bros. of California,* a co-partnership composed of Fred Andrews and Victor C. Andrews, Appellant, vs. *Central Produce Company,* a corporation, Appellee, No. 11653" and that said judgment of the Court of Appeals may be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioner will ever pray.

BENJAMIN W. SHIPMAN,
Counsel for Petitioner.

HENRY O. WACKERBARTH,
Of Counsel.

Certificate of Counsel.

Benjamin W. Shipman, counsel for petitioner in the above entitled proceeding, does hereby certify that the foregoing petition is well-founded and not interposed for delay.

BENJAMIN W. SHIPMAN.

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ANDREW BROS. OF CALIFORNIA, a co-partnership composed of Fred Andrews and Victor C. Andrews,
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vs.

CENTRAL PRODUCE COMPANY, a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below and of the Secretary of Agriculture.

The order of the Secretary of Agriculture is dated April 20, 1949, and is reported in 8 Agri. Dec. p. 403.

The judgment of the District Court was docketed on April 10, 1952. [R. p. 134.]

The decision of the United States Court of Appeals was rendered and filed April 14, 1953. [R. p. 149.] The decision was reported in 203 F. 2 949 (Adv. Sheets).

A petition for rehearing was filed April 28, 1953, and denied on May 14, 1953. [R. pp. 151-167.]

No opinion was rendered by the Court in denying said rehearing.

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture in this proceeding is derived from the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A. Section 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo*, the appeal from the reparation order of the Secretary of Agriculture, is derived from the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is derived from Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is derived from Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statement of Facts.

On July 2, 1945, Andrews, as broker for two packing houses, entered into an agreement to sell Central 30 cars of Valencia oranges and 6 cars of grapefruit. Central advanced $300.00 per car on the purchase price. [R. pp. 119-120, Findings 4-6.]

Between July 6, 1945, and July 19, 1945, Andrews shipped 6 cars of oranges and grapefruit. The first and

second cars showed considerable damage to the boxes in transit and also some damage to the fruit. Central accepted protection from Andrews against loss on these cars. [R. pp. 121-122, Findings 9-10.]

The third car showed no damage. [R. p. 123, Finding 11.]

The fourth and fifth cars showed some damage to fruit. Central accepted a rebate on the fifth car because of condition of the fruit. [R. pp. 123-124, Findings 12-13.]

The sixth car showed no damage. [R. p. 124, Finding 14.]

Upon receipt of these various cars Central complained as to the quality of the fruit and the parties agreed that the contract could be modified by Central accepting 25 cars in fulfillment of the contract instead of the 29 still due. [R. pp. 124-125, Finding 15.]

The seventh and eighth cars, which were shipped on July 24 and July 27, 1945, showed a slight amount of damage. [R. pp. 125-126, Findings 16-17.]

On August 6, 1945, Central advised Andrews that it would not accept any more oranges. [R. p. 126, Finding 18.]

Before Central repudiated the contract Andrews had shipped the ninth, tenth, eleventh and twelfth cars. Central refused to accept these cars and they were sold at a loss of $2,450.58. [R. pp. 127-130, Findings 19-22.] Andrews did not ship any more fruit. [R. p. 130, Finding 23.]

IV.

Specifications of Error.

The Court of Appeals erred:

1. In holding that the District Court had jurisdiction to render a money judgment on a couter-claim seeking affirmative relief, filed with the Secretary of Agriculture more than nine months after the cause of action set forth therein arose.

2. In holding that the District Court need not follow the interpretation by the Secretary of Agriculture of the law under which it acts, and its own rules.

3. In holding that the law of the forum (Tennessee) applied in a proceeding arising under Federal law, where the jurisdiction of the Federal court is not based on diversity of citizenship, and the rule of the Federal courts is different from the rule in Tennessee.

4. In holding that Appellee (Central) had not waived the right to repudiate or rescind the contract by accepting carloads of fruit shipped, protection against loss and rebates, and otherwise altering the terms of the contract.

V.

Summary of Argument.

Point A. In a proceeding under the Perishable Agricultural Commodities Act, the filing of a counter-claim, seeking affirmative relief, within nine months after the cause of action set forth therein arose, is a jurisdictional prerequisite to the granting of affirmative relief thereon.

Point B. Where a Governmental Agency, acting in a quasi-judicial capacity, interprets the law under which it acts and its own rules, and consistently follows such interpretation for a long period of time, a reviewing court should follow the interpretation of said Agency, where the same is not contrary to the law or public policy.

Point C. Jurisdiction not being dependent upon diversity of citizenship, but upon Federal law, the law of the forum (Tennessee) should not govern.

Point D. Central waived the right to repudiate or rescind the contract by accepting carloads of fruit, protection against loss, and by changing the terms of the contract.

ARGUMENT.

POINT A.

In a Proceeding Under the Perishable Agricultural Commodities Act, the Filing of a Counter-claim, Seeking Affirmative Relief, Within Nine Months After the Cause of Action Set Forth Therein Arose, Is a Jurisdictional Prerequisite to the Granting of Affirmative Relief Thereon.

This presents an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Court of Appeals is in probable conflict with applicable decisions of this Court, in cases arising under statutes similar to the Perishable Agricultural Commodities Act.

The transactions between Andrews and Central commenced as of July 2, 1945 (date of contract) [R. p. 119, Finding 5], and ended August 8, 1945 (date on which respondent refused to accept any more shipments). [R. p. 126, Finding 18.]

Andrews filed its complaint with the Secretary of Agriculure on December 26, 1945 [R. p. 118], and Central filed an answer and also a counter-claim seeking affirmative relief on October 7, 1946 [R. p. 118], which was 14 months, lacking one day, after the cause of action arose.

Appellant contends that the counter-claim seeking affirmative relief was not filed within nine months after the cause of action set forth therein arose, as provided by the Perishable Agricultural Commodities Act and the rules established by the Secretary of Agriculture, and that filing within such time is a jurisdictional prerequisite to the granting of affirmative relief thereon.

The Perishable Agricultural Commodities Act was adopted in 1930 (46 Stat. 531) and has been amended from time to time. (7 U. S. C. A., Sec. 499.) The provisions of the Act and amendments pertinent to the issues involved in this case are:

It shall be unlawful in connection with any transaction in interstate commerce for any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause, any perishable agricultural commodities bought or sold in interstate commerce. (Sec. 2 of the Act.)

If any commission merchant or broker violates any of the provisions of Section 2 of the Act he shall be liable to the person injured for the full amount of damages sustained and such liability may be enforced either (1) by complaint to the Secretary, or (2) by suit in any court of competent jurisdiction, said Section not abridging or altering the remedies existing at common law or by statute but being in addition to such remedies. Sec. 5.)

Any person complaining of a violation of the provisions of Section 2 by a commission merchant or broker "may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts," and if the Secretary is of the opinion that the facts warrant it, he may require the party complained against to answer in writing within a reasonable time to be prescribed by the Secretary. (Sec. 6.)

If, after hearing a complaint the Secretary determines that the commission merchant or broker has violated any provision of Section 2, he shall make an order directing the offender to pay the person complaining the amount of damages sustained. (Sec. 7.)

Either party adversely affected by the entry of a reparation order by the Secretary may, within 30 days from the date of such order, appeal to the United States District Court for the district in which said hearing was held. (Sec. 7(c).)

"The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of" the Act. The Perishable Agricultural Commodities Act "shall not abrogate nor nullify any other statute whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto." (Sec. 15.)

By virtue of the authority vested in the Secretary of Agriculture by the Administrative Procedure Act (60 Stat. 237; 5 U. S. C. 1001 *et seq.*) and the Perishable Agricultural Commodities Act, 1930, as amended (46 Stat. 531; 7 U. S. C. 1940 Ed. 499(a) *et seq.*, and Supp. IV 499(b)) the Secretary of Agriculture issued certain Rules of Practice.

These rules were published in the Federal Register as follows: E. O. 9322, 8 Fed. Reg. 3807; E. O. 9334, 8 Fed. Reg. 5423; E. O. 9392, 8 Fed. Reg. 14783; E. O. 9577, 10 Fed. Reg. 8087; 10 Fed. Reg. 2209; 11 Fed. Reg. 224.

The rules of practice pertinent to this proceeding are:

(a) Any interested person desiring to complain of any violation of any provision of the Act by a commission merchant or broker, may file an informal complaint. If the informal complaint is to be made the basis of a claim for damages "it must be filed within 9 months after the cause of action accrues." (Sec. 47.3.)

(b) If the informal complaint does not effect an amicable adjustment of the matter a formal complaint may be filed. (Sec. 47.6.)

(c) Within 20 days after the service of the formal complaint the respondent may file an answer which shall contain a precise statement of facts which constitute the grounds of defense, including any set-off or counter-claim. (Sec. 47.8.)

The Act granted a new statutory remedy to be pursued before a new statutory tribunal but it created a jurisdictional time within which the new remedy could be pursued.

An injured party has a common law right to sue in a court of competent jurisdiction and this right was preserved by the Act (Sec. 5). The complaint to the Secretary was a new remedy which did not exist before the adoption of the Act.

The Act does not provide for the filing of an answer to the complaint or petition, but the rules adopted by the Secretary authorize the filing of an answer which may contain a counterclaim or setoff.

The Act provides that a person seeking relief must do so "by a petition." It does not say that the petition must be a complaint. Any document filed by the complaining party with the Secretary would be sufficient. The petition might be in the form of (1) a complaint, or (2) a counterclaim seeking affirmative relief. Regardless of which form is adopted, it must be filed within the nine months period.

The filing of the petition (by complaint or counterclaim) is a jurisdictional prerequisite to the granting of affirmative relief as distinguished from defensive relief such as setoff or recoupment.

The Secretary has decided in more than fifteen cases, hereinafter referred to, that the filing of a counterclaim seeking affirmative relief within nine months after the cause of action set forth therein arose, is a jurisdictional prerequisite to the granting of affirmative relief on the counterclaim, as distinguished from defensive relief such as setoff or recoupment.

So far as we have been able to find, the point in issue herein has never been decided by any court under the provisions of the Perishable Agricultural Commodities Act except in the instant case.

This question of jurisdiction has been decided by this Court in connection with the Interstate Commerce Act and the Court of Claims Act and we believe that such rulings should apply with equal force to the Perishable Agricultural Commodities Act.

Decisions Under the Interstate Commerce Act.

The Interstate Commerce Act provides that shippers paying excessive charges for freight, may file a proceeding before the Interstate Commerce Commission and, in a proper case, a reparation order may be made by the Commission requiring the shipper to repay the excessive charges.

The Interstate Commerce Act (Sec. 16) provides:

> "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

In the case of *United States, Etc. v. Interstate Commerce Commission,* 246 U. S. 638, 62 L. Ed. 914, the Court considered a proceeding before the Commission in

regard to refunding overcharges. The Interstate Commerce Commission had held in other cases that claims filed more than two years after the cause of action arose were barred. In a similar case the Commission had stated:

> "In this report only such shipments will be considered as moved within two years from the time the complaint embracing them was filed, and with respect to shipments moving prior to such two-year period we think it proper to state that, following the spirit as well as the letter of the limitation clause contained in Sec. 16 of the act, we believe *we are wtihout jurisdiction,* and therefore will not make any findings whatever concerning such shipments or the rates and charges assessed thereon."

With reference to this statement the Supreme Court, in the case above referred to, stated:

> "It is thus made very clear that the holding of the Commission was not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed."

The Supreme Court then stated:

> "We agree that this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional, is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion * * *."

In the case of *Phillips v. Grand Trunk Western R. Co.*, 236 U. S. 662-667, 59 L. Ed. 774-776, 33 S. Ct. 444, plaintiff sued to recover certain claimed excessive freight charges. The action was filed more than two years after the claimed excessive freight rates were paid. With reference to Section 16 of the act the Court said:

> "* * * Under such a statute the lapse of time not only bars the remedy, but destroys the liability (citing cases), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. * * * For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

In the case of *Pennsylvania R. Co. v. Miller* (C. C. A. 5th Cir.), 124 F. 2d 160, the plaintiff sued to recover certain freight charges and defendant sought to offset damages incurred in the shipment. The defendant did not ask for an affirmative judgment, but only to offset the damages against the plaintiff's claim. Plaintiff contended that the offset was barred under the provisions of Section 16 of the Interstate Commerce Act. With reference to this contention the Court stated:

> "The cited portion of the bill of lading is a limitation upon the time within which suits to enforce the recovery of claims may be instituted, and limits the period of existence of an action for recovery against the carrier. * * *"

Decisions Under the Court of Claims Act.

The Court of Claims Act provides:

> "Sec. 10. That every claim against the United States cognizable by the court of claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this Act, within six years after the claim first accrues. Provided however * * *." (Rev. Stat. 1069.)

With reference to this provision of the law this Court has held in the following cases that the filing of the claim by petition within the time limit was jurisdictional:

Finn v. United States, 123 U. S. 227, 31 L. Ed. 128;

Ford v. United States, 116 U. S. 213, 29 L. Ed. 608;

United States v. Wardwell, 172 U. S. 48, 43 L. Ed. 360.

The decisions of this Court with reference to the Interstate Commerce Act and the Court of Claims Act should apply with equal force to the provisions of the Perishable Agricultural Commodities Act. The Acts, with reference to the time of filing claims, are substantially the same, and this Court has held that filing within the time limit is jurisdictional.

If Central had a cause of action against Andrews, it had such knowledge on August 8, 1945 (the date it refused to accept any more shipments of fruit); it could

thereupon have pursued a cause of action to recover such damages as claimed, by an action in a court of competent jurisdiction or by a petition before the Secretary. It did not pursue either remedy.

The Act does not establish a statute of limitations within which a remedy may be pursued, but establishes a jurisdictional prerequisite, and the complaint seeking relief must be filed within that period of time in order that the Secretary or the District Court has jurisdiction to grant affirmative relief on a counterclaim.

Section 15 of the Act does not abrogate or nullify other statutes, Federal or State, but such statutes shall remain in full force and effect "except in so far only as they are inconsistent" with the Act "or repugnant" to the Act.

Sections 8745, 8746 and 8749 of the Tennessee Code (referred to under Point C) establish a statute of limitations. They are not statutes granting a new right to be pursued before a new tribunal wherein a time limit is established for the commencement of the proceeding.

The provisions of the Tenneessee law, if applicable, would be "inconsistent" with "or repugnant" to the provisions of the Perishable Agricultural Commodities Act and the Tennessee law, therefore, would not apply.

We submit that the District Court had no jurisdiction to grant affirmative relief on the counterclaim in question and that the Court of Appeals erred in affirming the judgment of the District Court.

POINT B.

Where a Governmental Agency, Acting in a Quasi-judicial Capacity, Interprets the Law Under Which It Acts and Its Own Rules, and Consistently Follows Such Interpretation for a Long Period of Time, a Reviewing Court Should Follow the Interpretation of said Agency Where the Same Is Not Contrary to the Law or Public Policy.

This question calls for the exercise of jurisdiction by this Court in order to establish uniformity of federal decisions.

The Secretary of Agriculture has been handling complaints under this Act since its inception and interpreting the sections of the Act and its own rules with reference to the time limit in which counterclaims can be filed.

The Secretary has consistently held, for more than ten years, that under the Act and rules adopted, a counterclaim seeking affirmative relief must be filed within nine months after the cause of action arose, regardless of the fact that the original complaint (filed by the adverse party) was filed within the nine-month period.

See cases of:

Horowitz Brothers v. H. Rothstein & Sons, Inc. and *H. Rothstein & Sons, Inc. v. Horowitz Brothers, et al.*, 2 Ag. Dec. 67-70;

Gilliland & Co. v. San Antonio Commission Co., 2 Ag. Dec. 492-4-5;

Ricks Fertilizer Co. v. M. Dunn & Co., 5 Ag. Dec. 194-6-7;

Kenneth G. Powers v. Schley Bros., 5 Ag. Dec. 617-23-25;

Ag. Case 1442 (names not disclosed), 6 Ag. Dec. 231. Counterclaim filed more than nine months after cause of action arose—allowed as recoupment or setoff, but affirmative relief denied, citing as authority *Stewart v. Simon* (Ark.), 163 S. W. 1135;

California Fruit Exchange v. Joseph Rothenberg, 7 Ag. Dec. 986-8;

Andrews v. Central, 8 Ag. Dec. 403, citing *Pennsylvania v. Miller*, 124 F. 2d 160, counterclaim used defensively;

Edna M. Sechler v. Tom Black, 9 Ag. Dec. 729. Dismissed for failure to file within nine months; no recoupment because a different transaction;

Trio Fruit Co. v. Keim Produce Co., 10 Ag. Dec. 157, citing *Gehl's Guernsey Farms v. Medfield*, 8 Ag. Dec. 187;

Lubet Produce v. Gordon Scharping, 5 Ag. Dec. 570;

The Schuman Co. v. Frank B. Constantine Co., 10 Ag. Dec. 201;

Case No. 2765 (names not disclosed), 10 Ag. Dec. 531-55;

Wm. Hedberg Inc. v. Edison Vegetable Growers, Inc., 10 Ag. Dec. 1000-5;

Rushton & Co. v. Hamilton & Cooper, 10 Ag. Dec. 1377-83;

Case No. 2789 (names not disclosed), 10 Ag. Dec. 662-5;

Gehl's Guernsey Farms, Inc. v. Midfield, etc., 8 Ag. Dec. 187.

In reviewing decisions of the Secretary of Agriculture the courts should follow the interpretation placed by the Secretary on the Act under which he exercises quasi-judicial powers, and the rules adopted. The rule in this regard was laid down by the Court in the case of *L. Gillarde Co. v. Joseph Martinelli & Co. Inc.*, 169 F. 2d 70 (C. C. A. 1st Cir.), where the Court, after granting a rehearing in one of its cases, stated:

> "Upon consideration of the petition for rehearing and the briefs submitted, we think that since the Department has interpreted its regulation in a manner which it thinks necessary to carry out the purposes of the Act, and since the interpretation has been adhered to for over ten years, it should not be disregarded. Under these circumstances we hold that we should not substitute our interpretation merely because our original thought was that such a drastic interpretation is not needed to carry out the intent of the Act. The Department's interpretation is not clearly erroneous; it is a possible and reasonable interpretation of the regulation, even if not the only possible one. We therefore think it should be followed."

This decision was cited with approval in case of *Mancusco v. L. Gillarde Co.*, 61 A. 2d 677.

In the case of *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 89 L. Ed. 1700, the Court considered the interpretation and application of certain provisions of the Maximum Price Regulations issued by the Administrator

of the Office of Price Administration under the Emergency Price Control Act. The Administrator had placed an interpretation upon the regulations and the District Court and Circuit Court of Appeals had interpreted them otherwise. In the following the interpretation placed thereon by the Administrator, the Court said:

> "The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Secretary having interpreted the Act and its regulations so as to require a counterclaim seeking affirmative relief to be filed within nine months after the cause of action arose and said interpretation having been followed for over ten years, and the same not being contrary to law or public policy, it should be followed by the courts.

POINT C.

Jurisdiction Not Being Dependent Upon Diversity of Citizenship, But Upon Federal Law, the Law of the Forum (Tennessee) Should Not Govern.

Jurisdiction of this case by the Secretary of Agriculture and District Court did not arise by reason of diversity of citizenship—it was conferred by a Federal law.

Andrews contended that the Perishable Agricultural Commodities Act established the time limit (9 months after the cause of action set forth therein arose) within which a counterclaim should be filed. Central contended that the law of Tennessee permitted the filing of a counterclaim where the cause of action set forth therein had outlawed, provided the original complaint in the proceeding in which the counterclaim was filed, had been filed within the period of limitation.

The Court of Appeals sustained Central's contention and held that the Tennessee law applied stating:

> "We think the District Court ruled correctly in this respect, in applying sections 8745, 8746 and 8749 of the Tennessee Code. See *Harvey v. Campbell,* 166 Tenn. 369. Compare *Guaranty Trust Co. of New York v. York,* 326 U. S. 99." [R. p. 150.]

Section 15 of the Perishable Agricultural Commodities Act also provides:

> "* * * This act shall not abrogate nor nullify any other statute whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect *except in so far only as they are inconsistent herewith or repugnant hereto.*" (Italics ours.)

Congress having provided certain rights and the method of enforcing said rights and the time limit within which said rights may be enforced, the laws of Tennessee, which are contrary and repugnant to the Acts of Congress, do not apply.

In the case of *O'Brien v. Western Union Tel. Co.* (C. C. A. 1), 113 F. 2d 539, the Court considered an action for libel for transmitting a defamatory telegram. Defendant pleaded privilege. In holding that the defendant was governed by the Federal law and decisions and not by state law, the Court stated:

> "In determining the privilege of the defendant to transmit the libelous message in question, we are not bound by the common law or statutes either of Massachusetts, where the message originated, or of Michigan, where it was delivered. The telegram was an interstate message. It was transmitted by common carrier engaged in interstate communication by wire. The telegraph company is subject to the Communications Act * * * and to regulations thereunder by the Federal Communications Commission. * * * Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. * * * Notwithstanding *Erie Railroad Co. v. Tompkins*, * * * there still exist certain fields—and this is one—where legal relations are governed by a 'federal common law,' a body of decisional law developed by the federal courts untrammeled by state court decision. * * *."

In the case of *Deitrick v. Greaney,* 309 U. S. 190, 84 L. Ed. 694, this Court held that the Receiver of a National Bank could recover on a note given in connection with a transaction which under the Massachusetts law would have been unenforceable. In holding that the case was governed by the Federal law and not by the Massachusetts law the Court stated:

> "A point much discussed in brief and argument, * * * is whether by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, * * *. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question."

In the case of *D'Oench, etc. v. Federal Deposit Ins. Corp.,* 315 U. S. 447, 86 L. Ed. 956, this Court considered the question of which law was applicable in an action on a note brought in the District Court of Missouri. The District Court and the Circuit Court held the Illinois law applicable. Petitioners contended that the Missouri law (law of the forum) was applicable. In holding that the case should be decided by Federal law the Court stated:

> "The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or

> Federal.' * * * Whether the rule of *Klaxon Co. Case* applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of *Dietrick v. Greaney* * * *."

Under the foregoing decisions, the provisions of the Perishable Agricultural Commodities Act should apply and not the Tennessee Code.

POINT D.

Central Waived the Right to Repudiate or Rescind the Contract by Accepting Carloads of Fruit, Protection against Loss, and by Changing the Terms of the Contract.

The contract was entered into on July 2, 1945, for the sale of 36 cars of oranges and grapefruit, to be shipped 3 carloads a week. [R. p. 119, Finding 5.] Deliveries were not made in accordance with the terms of the contract. [R. p. 120, Finding 8.] Central contended Andrews breached the contract by (1) not shipping the required number of cars each week; (2) shipping mixed cars—that is, cars containing oranges and grapefruit; (3) shipping carloads containing boxes and bags, and (4) shipping overmature fruit and fruit containing excessive skin breakdown. The District Court held that these were sufficient grounds for Central repudiating the contract. [R. p. 131, Conclusion 4.]

Andrews contended that Central waived the right to rescind or repudiate the contract (1) by accepting protection against loss as to the first and second cars shipped; (2) by accepting and paying for the third car which

showed no damage to the fruit but contained oranges in boxes and oranges in bags; (3) by accepting and paying for the fourth car which contained 38 boxes of smaller oranges than provided for in the contract; (4) by accepting and paying for the fifth car and accepting a refund of 25¢ a box for the damaged condition of the fruit; (5) by accepting and paying for the sixth car which showed no evidence of damage; (6) by modifying the contract on July 24, 1945, by agreeing to the shipment and acceptance of 25 additional cars as the completion of the contract, rather than 29 cars which were yet to be shipped [R. p. 121, *et seq.*, Findings 9-16], and (7) by accepting and paying for the seventh and eighth cars after complaining as to the condition of the fruit. [R. p. 125, Findings 16-17.]

Andrews contends that by reason of the acceptance of all of the fruit, the acceptance of protection on the first two cars, the acceptance of a refund on the fifth car, the modification of the contract by accepting 25 cars in lieu of 29 to be delivered, constitutes a waiver of the right to rescind or repudiate the contract because of failure to comply with the terms thereof.

The rule with reference to waiver of right of rescission or repudiation of a contract for delivery in installments is set forth in *Page on Contracts,* Section 1492, as follows:

> "If the vendor delivers the amount agreed upon for each installment as it comes due, the fact that the goods delivered in certain installments are not up to the standard fixed by the contract is not such a breach of the entire contract as excuses the vendee from taking and paying for the remaining installments."

Mechem sets forth the rule as follows:

> "The fact that the first installments which have been accepted did not comply with the contract will not justify the buyer in refusing to accept subsequent installments which do conform to it." (Mechem on Sales, Sec. 1399.)

See also:

47 Am. Jur., p. 460, Sec. 276.

The rule above set forth has been followed by the courts of last resort of Tennessee and California and many other states, and also by the Federal courts in the following cases:

John Deere Plow Co. v. Shellabarger, 140 Tenn. 123, 203 S. W. 756;

Boyles v. Kingsbaker Bros. Co., 5 Cal. 2d 68;

McDonald v. Kansas City Bolt & Nut Co. (C. C. A. 8th Cir.), 149 Fed. 360;

Henry H. Cross Co. v. Texhoma Oil (C. C. A. 8th Cir.), 32 F. 2d 42;

Clark v. Wheeling (C. C. A. 3rd Cir.), 53 Fed. 495;

Harding v. York (C. C., Middle Dist. of Pa.), 142 Fed. 228;

Reynolds v. Palmer (C. C., Western Dist. No. C), 21 Fed. 433;

John Service, Inc. v. Goodnow-Pearson Co., 242 Mass. 594, 136 N. E. 623;

J. W. Eillison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S. E. 391.

Under the facts hereinbefore set out and the foregoing authorities, and particularly the Federal and Tennessee decisions, Central waived the right to rescind or repudiate the contract.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and that to such end a writ of certiorari may be granted and that this Court should review the decision of the United States Court of Appeals, for the Sixth Circuit, and reverse same with directions to said Court to dismiss the counter-claim of Appellee Central and determine the claim of Andrews in accordance with the law set forth in the foregoing brief.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 243

ANDREWS BROS. OF CALIFORNIA, a co-partnership composed of Fred Andrews and Victor C. Andrews,

Petitioner,

vs.

CENTRAL PRODUCE COMPANY, a corporation,

Respondent.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
Contract	1
Statement of Fact	2
Conclusions	2
Judgment	3
Issues of Law	4
Acceptance Final	5
Rejection	6
Repudiation	7
Waiver	8
Points A. B. C.	9
Sec. 499F P.A.C.A.	10
Rules of Practice	11
Counter-claim	12, 16
Jurisdiction	14
Tennessee Law	15
Section 499g (c) P.A.C.A.	20
Federal Rules	21
Conclusion	24

TABLE OF CASES

PAGE

Bourne v. Board of Financial Control, 207 N. C. 170 12
Boyles v. Kingsbaker Bros., 5 Cal. 2d 68 8
Charles Albert Association v. Associated Fruit Co., 238 Ill. 11 5
Cinc. Daily Tribune Co. v. Bruck, 61 Ohio St. 499 13
Concrete Steel Co. v. Reinforced Concrete Co., 72 S. W. 2d 118 17
Cowan v. Donaldson, 95 Tenn. 322 16
Denton v. Delwuler, 48 Idaho 369 17
Derma Diva Co., Inc. v. Kals Co., Inc., 176 N. Y. S. 776 6
Dertrick v. Greaney, 309 U. S. 190 23
Dunn v. Bell, 85 Tenn. 581 17
Earnest E. Fadler Co. v. Hesser, 166 Fed. 2d 904 19
Erie R. Co. v. Tompkins, 304 U. S. 822 18
Fletcher v. O'Zark Packing Co., 188 F. 2d 658 24
French Republic v. Inland Navy Co., 263 Fed. 410 13
Goodnow v. Holkiss, 230 Fed. 514 13
Guarantee Trust Co. v. York, 326 U. S. 99 19
Hartford Accident & Indemnity Co. v. People of Ill., 56 S. Ct. 685, 298 U. S. 155 19
Harvey v. Campbell, 166 Tenn. 369 17
Horton Food Produce Corp. v. E. H. Stevens Co., Inc. 197 N. Y. S. 34 5
Huggins v. Smitt, 141 Ark. 87 17
John Deere Plow Co. v. Shallenberger, 140 Tenn. 123 8
L. Gillarde Co. v. Joseph Martinalli 160 F. 2nd 60 22
LeRoy Dyle Co., Inc., v. Allen, 161 F. 2d 152 6
Maryland Casualty Co. v. Sheffer, 57 Cal. App. 573 17
McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 260 9
North Carolina Cotton Growers Ass'n. v. Tiller, 201 N. C. 531 17
O'Brien v. Western Union Tel. Co., 113 F. 2d 539 20
Paducah & M. R. Co. v. Parks, 86 Tenn. 554 16

PAGE

Patton Tully Tran's Co. v. Turner, 260 F. 334 16
Pennsylvania v. Miller, 124 F. 2d 160 14
Pruitt Co. v. Fruit Dispatch Co., 129 S. W. 1160 7
Shepherd v. Hardware Co., 198 Ala. 275 5
Sherrell Russell Lumber Co. v. Drug Lumber Co., 267 S. W. 14 7
Sinor v. Light Co., 182 N. Y. S. 30 5
State v. Ark. Brick & Mfg. Co., 135 S. D. 843 13
Union Sugar Co. v. Hollisler Estate Co., 3 Cal. 2d 740 17
United States v. Interstate Commerce Com., 246 U. S. 638 14
Valley Refining Co. v. Roach, 167 Okla. 266 7
Yellowday v. Perkins, S. E. 341 12
William v. Lenoir, 67 Tenn. 395 16

STATUTES AND REGULATIONS

PAGE

Sec. 499F(a) Title 7 U.S.C.A. 10
Sec. 499F(e) Title 7 U.S.C.A. 13
Sec. 499g(c) Title 7 U.S.C.A. 20
Sec. 499o Title 7 U.S.C.A. 11-18
Rule 13 (a) (b) (e) (f) Title 28 U.S.C.A. 21
Rule 81 (a) (4) Title 28 U.S.C.A. 22
Tennessee Statutes Sec. 8571 15
Tennessee Statutes Sec. 8745 16
Tennessee Statutes Sec. 8746 16
Tennessee Statutes Sec. 8749 16
Tennessee Statutes Sec. 8772 16
Rules and Regulation by Secretary,
Sec. 47.8(a) 11, 14
Sec. 47.8(b) 11, 14
Sec. 47.9 12

IN THE

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No.--------

ANDREWS BROS. OF CALIFORNIA, a co-partnership composed of Fred Andrews and Victor C. Andrews,

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vs.

CENTRAL PRODUCE COMPANY, a corporation,

Respondent.

REPLY BRIEF OF APPELLEE

Appellee, Central Produce Company, files this its reply brief in the above style cause, and will refer to the parties as Appellant and Appellee.

This was an action growing out of a contract entered into by wire between Appellant and Appellee, July 2, 1945.

Contract

Appellant and Appellee entered into a contract July 2, 1945, for the sale and purchase of 30 cars of oranges and 6 cars of grapefruit to be shipped from Orange and Riverside Counties, California, at the rate of two cars of oranges and one car of grapefruit each week. The contract specified Buddy Brand quality fruit, shipping point acceptance final. Appellee made a deposit with Appellant of $10,-

800.00 equivalent to $300.00 per car, as specified in the contract. [R. 119-120, Par. 5 and 6.]

Statement of Fact

Appellant shipped and Appellee accepted, and paid for, the first eight cars, although complaints were made by Appellee regarding the grade, quality and shipping condition of the fruit in each car received. [R. 124, 126.]

Appellee rejected the 9th, 10th, 11th, and 12th cars shipped by Andrews predicating its refusal to accept by reason of the inferior grade, quality and shipping conditions of the fruit in the first 8 cars. [R. 126, Par. 18.]

Appellant, Andrews, filed a formal complaint against Appellee December 26, 1945, the complaint was withdrawn for minor corrections and refiled May 27, 1946, being served upon Appellee September 23, 1946. Answer containing a counter-claim was filed by Appellee October 7, 1946. [R. 118, p. 130.]

The matter was duly determined by the Secretary of Agriculture.

Conclusions

Both litigants, being dissatisfied with the conclusions reached by the Secretary of Agriculture, petitioned the Federal District Court at Nashville for a re-trial, wherein the matter in controversy was tried *de novo*.

The Federal District Court concluded upon the pleadings, evidence, exhibits and findings of the Secretary of Agriculture, that: [R. p. 117]

> "The agreement between the parties was in effect an f.o.b. acceptance final contract binding upon Respondent (Central) to accept all shipments of fruit at

point of origin, and binding Complainant to load and ship the kind, type and grade of fruit called for in the contract, in such condition, if handled under normal transportation service and condition, would assure delivery without abnormal deterioration." [R. p. 130, Par. 2.]

"The contract specified Buddy Brand oranges and Buddy Brand grapefruit, said name being used to specify a top grade and quality of fruit, it being incumbent upon Complainant to load and ship top quality oranges and grapefruit, this not being done, Complainant as a matter of law and fact breached its contract with Respondent." [R. p. 131, Par. 3.]

"In violation of the contract Complainant shipped overmature fruit lacking in firmness, and containing excessive skin breakdown, which existed at time of shipment, as well as shipping mixed cars and fruit in bags in further violation of the contract, all of which constitutes sufficient grounds for repudiation of the contract by Respondent." [R. p. 131, Par. 4.]

"Respondent's repudiation of the contract was justified because Complainant substantially breached the contract with respect to the first 8 carloads of fruit. Respondent's rejection of the 4 carloads (9th, 10th, 11th and 12th) shipped and in transit prior to its repudiation was in violation of the 'acceptance final' term of the contract and the loss occasioned to the original complaint on these cars in the sum of $2,450.58 should be allowed as an offset against any recovery allowed Respondent in its counter claim." [R. p. 133, Par. 9.]

Judgment

Judgment was rendered in favor of Appellee for $7,200.00 representing the unused portion of the deposit made at date of contract, together with $2,340.62 loss by repacking the 8 cars received, less $2,450.58 damage due Appellant on the 4 cars rejected by Appellee, and interest on the balance at 5 percent in the sum of $2,197.92, a total of

$9,287.99 with attorneys fee of $1,000.00 to the successful appellee. [R. p. 134.]

The Court adopted the findings of fact of the Secretary of Agriculture. [R. p. 118.]

The Circuit Court of Appeals affirmed the judgment of the District Court, stating in brief:

> "The United States District Court approved and adopted as its own findings of the administrative official of the Department of Agriculture. The court also adopted the conclusions of that agency, except in one particular, which was that the appellee should have been permitted to assert its counter-claim for affirmative relief. We think the District Court ruled correctly in this respect, in applying sections 8745, 8756 and 8749 of the Tennessee Code. See *Harvey v. Campbell,* 166 Tenn. 369. Compare *Guaranty Trust Co. of New York v. York,* 326 U. S. 99.
>
> This court is of opinion that there was ample substantial evidence to support the findings of fact of the designated agent of the Secretary of Agriculture and the concurring findings of the District Court. It has been held that the Perishable Agriculture Commodities Act was not intended to repeal the law of sales or to destroy rights or liabilities of contracting parties. *Ernest E. Fadler Co. v. Hesser,* 166 F. (2d) 904 (C. A. 10)." [R. p. 149.]

Issues of Law

Appellant raises four questions in its brief denoted as Points A, B, C, D, predicated upon four similar specifications of error, assigned to the action of the Circuit Court of Appeals. (Appellant's Brief p. 12-13.)

In order to discuss matters in their logical sequence we examine Point D raised by appellant first—(Appellant's Brief 30).

Point D. "Central waived the right to repudiate or rescind the contract by accepting carloads of fruit, protection against loss, and by changing the terms of the contract."

Acceptance Final Contract

The fundamental difference between an f.o.b. Acceptance Final Contract and a delivered contract revolves around the question of title, in the former, title passes to the purchaser as soon as the goods are placed on board for shipment, in a delivered contract the title passes upon receipt and inspection by the purchaser.

It was held in *Shepherd v. Hardware Co.*, 198 Ala. 275:

> "That merchandise was shipped to defendant f.o.b. car delivered to Railroad Company *prima facie* vest title in defendant and was delivered to him."

In the case of *Sinor v. Light Company*, 182 N. Y. S. 30, the Court stated:

> "Under the common provisions f.o.b. place of shipment the sellers obligation is complete when he ships the goods and the title to them passes then, and he is not obligated to pay the freight, but if the agreement is f.o.b. destination the seller must pay the freight and may be deemed to retain the title of the goods until their arrival at the point of destination, but if there is anything to show that the intention of the party was different, that will control."

In the case of *Horton Food Produce Corporation v. E. H. Stevens Co., Inc.*, 197 N. Y. S. 34, the Court says:

> "When a sale is made f.o.b. the point of shipment, title passes to the buyer at the moment of delivery to the carrier, whether the bill of laden runs to the consignee or to the consignors agent."

In the case of *Charles Albert Association v. Associated Fruit Company*, 238 Ill. 11, the Court held:

"A sale of perishable fruit under invoice provided f.o.b. shipping point means delivery to the buyer at that point, and at his risk from the time of sale, and thereafter the title to the fruit in question is deemed to have passed to the purchaser at that point at the time of the sale and its risks from that point."

Rejection

The purchaser may not lawfully reject an f.o.b. acceptance final shipment on arrival.

In the case of *Derma Diva Co., Inc. v. Kals Co., Inc.*, 176 N. Y. S. 776, the Court stated:

"In an action for purchase price for goods sold f.o.b. point of shipment the buyer cannot reject shipment on its arrival because of damage during transit, title having passed by the bill of laden and deterioration in transit falls on consignee."

In the case of *LeRoy Dyal Co., Inc., v. Allen,* (C. C. A. Fourth Circuit) 161 F. (2d), 152, the Court held:

"F.o.b. Acceptance means the same as f.o.b. except that the buyer accepts full responsibility for the goods at shipping point and has no right of rejection upon arrival, nor has he any recourse against the shipper because of any change in condition of the produce in transit, unless the produce when shipped was not in suitable shipping condition. The buyers remedy under this method of purchase is by recovery of damage from the shipper and not by rejection of the shipment."

(M) "F.o.b. Acceptance final means that the buyer accepts the product f.o.b. cars shipping point without recourse."

"It is needless, however, to further discuss the points raised since the contract of sale was on an f.o.b. acceptance final basis. This term as understood in trade meant that respondent had no right of rejection and was without recourse for any change in quality or conditions during transit. If other specifications stated in the contract, such as grade or quality at shipping

point, or time of shipment, were breached, the respondents would be entitled to recover for losses shown to have been sustained."

Repudiation

The terms "rejection" and "repudiation" are in no wise synonymous in an f.o.b. installment contract. The purchaser may not lawfully reject cars on arrival. However, he may repudiate the contract for cause and refuse to accept the remaining installments under the contract if done so prior to the product being placed on board for shipment.

In the case of *Sherrell Russell Lumber Co. v. Drug Lumber Co.,* 267 SW 14, the Court stated:

> "It is an established rule of law that the purchaser under an entire and indivisible contract may, upon giving timely and reasonable notice, to the vendor, refuse to accept lumber which does not reasonably comply with the contract. It is clearly well established that a custom of usage when relied upon as a constituent part of a contract must be reasonable."

Valley Refining Company v. Roach Installation Company, 167 Okla. 266:

> "Where a contract for sale of a given commodity of a specified quality to be delivered to the purchaser by successive installments, goods of inferior quality are delivered in the early installments to the purchaser, though he accepts the early installments, promptly complains of the defective quality thereof and demands an observance of the terms of the contract and the seller notwithstanding such complaint continues to ship defective goods, the purchaser is justified in assuming that the seller does not intend to abide by the terms of the contract and they may cancel the same as to future installments."

In the case of *Pruitt Co. v. Fruit Dispatch Co.,* 129 SW 1160, the Court stated:

"The principal of law involved is that the buyer is not required to receive goods which were not goods he ordered or agreed to purchase. The rule is well established, citing Mechem Sales, Section 1154."

Waiver

Appellant relied on several authorities to sustain his proposition of waiver which we think are not in point. For instance, *John Deere Plow Co. v. Shallenberger,* 140 Tenn. 123, this was an installment contract in which the Plow Company was entitled to accept or reject each car delivered with defective goods, upon arrival and inspection. The Plow Company, although armed with an option of rejection, chose to accept the car, thus waived their right to rescind. The Court in determining the matter concluded:

"If the promisee with knowledge of the breach, retains property delivered to him in performance of the contract which property it is possible for him to return to promiser, such retention amounts to a waiver of the breach so as to preclude him from using such breach as a discharge." (Citing Page on Contract, Sec. 1500.)

The following cases cited by Appellant deal entirely with shipments wherein the consignees were legally entitled to reject shipment on arrival if said shipment did not conform to the contract, thus by retaining the shipments waived their option to rescind the contract because of the defective condition of the shipment.

In the case of *Boyles v. Kingsbaker Bros. Co.,* 5 Col. 2d 68. Plaintiff sought to recover damages for failure to accept pears sold under a contract providing for delivery in installments. The purchaser accepted two cars of fruit shipped and complained as to their quality. An adjustment was made by the seller. The buyer thereupon contended that it was entitled to rescind the contract because the first

two cars were not in accordance with the contract requirements, the Court stated:

> ". . . Thus, compromise of matters involved in that dispute could not from the basis of a new complaint or enter into a future controversy, as it was settled with the consent of all without any intention on the part of Mr. Kingsbaker that he regarded it as grounds for declaring the contract at an end. . . ."

In the case of *McDonald v. Kansas City Bolt and Nut Co.*, (C. C. A. 8th Cir.) 149 Fed. 260, the Court held:

> "That the purchaser waived the right to rescind the contract by receiving and accepting the first three cars shipped and not *rejecting* all of same upon examining the contents thereof."

The following cases, also cited by Appellant, do not involve an acceptance final contract and are irrevelant to the matter at hand.

Henry H. Cross Co. v. Texhoma Oil (C. C. A. 8 Cir.) 32 F. 2d 42.

Clark v. Wheeling (C. C. A. 3rd Cir.) 53 Fed. 495.

Reynolds v. Palmer, 21 Fed. 433.

John Service, Inc. v. Goodnow-Pearson Co., 242 Mass 594, 136 N.E. 623.

J. W. Ellison Son & Co. v. Flat Top Grocery Co., 69 W. Va. 38, 71 S.E. 391.

Appellee insists that in a contract, to be delivered in installments, waiver becomes a pertinent factor in litigation between the seller and buyer, only when the buyer, having the *right of inspection and rejection, voluntarily* accepts a shipment knowing it did not conform to the contract. The present case involved an F.O.B. shipping point acceptance final contract.

Point A, B, and C

Appellant's first, second and third proposition, desig-

nated Point A, B and C can easily be discussed as one since they are directed to the same alleged error of the Circuit Court of Appeals, to wit: The allowance of affirmative relief to Appellee on its counter-claim.

Point A. "In a proceeding under the Perishable Agricultural Commodities Act, the filing of a counter-claim seeking affirmative relief, within nine months after the cause of action set forth therein arose, is a jurisdictional pre-requisite to the granting of affirmative relief thereon."

Point B. "Where a Governmental agency, acting in a quasi-judicial capacity, interprets the law under which it acts and its own rules, and consistently follows such interpretation for a long period of time, a reviewing court should follow the interpretations of said agency, where the same is not contrary to public policy."

Point C. "Jurisdiction not being dependent upon diversity of citizenship, but upon Federal Law, the law of the Forum (Tennessee) should not govern."

Appellant bases its contention in the first instance on the supposition that the statute creating the remedy, forbids affirmative relief, whether it be by original petition or by answer and counter-claim, unless each have been filed within the nine months period. This we insist, is at variance with a proper construction of the statute.

This suit was instituted under the Perishable Agricultural Commodities Act of 1930 as amended, Title 7, Section 499A through 499R USCA.

Section 499F

(A) "Any person complaining of any violation of any provision of Section 499d by any commission merchant, dealer, or broker, *may at any time within 9 months after cause of action accrued,* apply to the Secretary by petition which shall briefly state the facts,

whereupon, if in the opinion of the Secretary, the facts therein contained warrant such action, *a copy of the complaint thus made shall be forwarded* by the Secretary to the *commission merchant, dealer,* or *broker* who shall be called upon to satisfy the complaint or to *answer it in writing within a reasonable time to be prescribed by the Secretary.*" (Italics ours.)

Section 499o

"The Secretary may make such rules and regulations and orders as may be necessary to carry out the provisions of this chapter, and may cooperate with any department or agency of the government in any state, territory, district or possession, or department, agencies, or political sub-division thereof. . . ."

Rules of Practice before the Secretary

Pursuant to the authority given the Commissioner of Agriculture certain rules of procedure were promulgated and published in the Federal Register as follows: 8 Fed. Reg. 3807-5423-14783, 10 Fed. Reg. 8087-22209; 11 Fed. Reg. 224.

Section 47.8 of said Rules and Regulations is as follows:

(a) "Filing and service. *Within 20 days after service of the formal complaint,* unless extension of time has been requested and granted, the respondent may file with the branch an answer, in triplicate, signed by the respondent or his attorney. A copy of the answer shall be served upon the complainant by the branch as provided by Section 47.4." (Italics ours.)

(b) "Content. Such *answer* shall contain (1) a precise statement of facts which constitute the grounds of defense, *including any set off or counter claim,* and shall specifically admit, deny, or explain each of the allegations of the complaint, unless respondent is without knowledge, in which case the answer shall so state. . . ." (Italics ours.)

Section 47.9. "The reply (a) Filing and Service. If the *answer* asserts a *counter claim or a set off* the complaining party within ten days after the receipt of the answer, may file a reply with the branch. A copy of the reply shall be served upon the respondent by the branch as provided in Section 47.4." (Italics ours.)

Counter-claim

The rules and regulations promulgated by the Commissioner of Agriculture contemplate and provide for the filing of a counter-claim if done so within 20 days of the time service was had on the respondent, and appellee insist that regulations made pursuant to the Perishable Agricultural Commodities Act use the word "counter-claim" in Section 47.8 (a) (b) and 47.9 (a) *supra,* in its usual and legal sense.

"Counter-claim is a cross action by defendant against plaintiff. It includes set off, recoupment, cross action, but is broader in meaning than any of them. It secured to the defendant full relief which was a separate suit at law, bill in chancery, or cross bill would have secured to him on the same state of facts." *Bourne v. Board of Financial Control for Bunkin County,* 207 NC 170.

"The term counter-claim is broader than recoupment, set off or cross action and includes them all, securing to the defendant the full relief which a separate action at law, or a bill in Chancery would have secured and in an injunction to prevent plaintiff from trespassing on the land, on the grounds that he was a dangerous character, and insolvent, is a counter-claim which deprives plaintiff of a right to dismiss the action by submitting a voluntary non-suit." *Yellowday v. Perkins,* 83 S.E. 341.

"Equity rules 30 provides that the answer must state in short and simple form any counter-claim arising out of a transaction which is the subject matter of the suit, and may, without cross bill, set out any set off

or counter-claim against plaintiff which might be subject of an independent suit in equity against him, and that such set off or counter-claim shall have the same effect as the cross-suit. *Goodnow v. Hotchkiss,* 230 Fed. 514.

"The counter-claim is a cause of action in favor of the defendant and against plaintiff arising out of a transaction or contract pleaded by plaintiff, and on which plaintiff's claim is based." *French Republic v. Inland Navy Co.,* DC Mo. 263 Fed. 410.

Where a counter-claim under the code grows out of or is connected with the transaction on which plaintiff sues, defendant may recover any balance plaintiff owes him over and above plaintiff's claim. *State v. Ark. Brick and Mfg. Co.,* 135 S.W. 843.

Where the facts stated in an answer constitute a cause of action in favor of the defendant for the recovery of damages against the plaintiff, and are connected with the subject of the action, it is sufficient to warrant their being pleaded as a counter-claim. *Cinc. Daily Tribune Co. v. Bruck,* 56 NE 198. 61 Ohio ST 489.

Section 499F (e)

The regulations prepared by the Secretary of Agriculture permitting the respondent to file an answer, including a counter-claim, is not in any wise repugnant to the Perishable Agricultural Commodities Act, in view of the fact that Section 499F (e) recognizes the right of respondent to file a counter-claim, quote:

"Section 499F (e). In case a complaint is made by a non-resident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish bond in double the amount of the claim conditioned upon the payment of cost . . . *and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter-claim by respondent.*" (Italics ours.)

Jurisdiction

It is urged by appellant that the nine months limitation in Sec. 499F (a) is a jurisdictional prerequisite to the granting of affirmative relief and applies to both original complaint and counter-claim. This we think, is incorrect as to answer and counter-claim, in view of the wording of the Statute involved, reiterated in brief for easy references.

> "Section 499F (a) . . .*May at any time within nine* months after cause of action accrued, apply to the Secretary by petition . . . to satisfy the complaint or to answer it in writing within a reasonable time to be prescribed by the Secretary." (Italics ours.)

Paragraph (e) of the same section clearly anticipates that some respondents at least will file counter-claims:

> (e) ". . . and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter-claim by respondent: . . ."

Appellant cites the case of *United States, etc. v. Interstate Commerce Commission,* 246 U. S. 638, involving a two year limitation for the filing of complaints under the Interstate Commerce Commission Act, wherein the Court held that the limitation of two years was jurisdictional. The Statute construed was not analogous to the statute under consideration in the case at bar. The jurisdictional question arose by reason of Section 16, as follows:

> Section 16. "All complaints for the recovery of damages *shall* be filed with the commission within two years from the time the cause of action accrues, *and not after.*" (Italics ours.)

In the case of *Pennsylvania v. Miller* (C. C. A. 5th Cir.) 124 F. 2d. 160, relied on by appellant is also not in point. (Appellant's Brief p. 20.)

In this case the question had to do with the construction of a contractural limitation between the parties. Plaintiff,

Railroad instituted suit against defendant, Miller, for unpaid freight charges, defendant countered witi a plea of recoupment based upon the negligence of the railroad in transporting onions, out of which the unpaid freight charges had accrued. These suits were filed more than two years after shipment.

The bill of laden required suit to be brought within two years and one day *or there would be no liability against the carrier.*

The Court allowed recoupment up to the amount of Plaintiff's claim. Counter-claim was not involved.

The bill of laden was a contractual limitation directed particularly at Miller whether or not he be plaintiff, defendant or counter-claimant. The shipping agreement simply stated that after a certain time there would be no liability against the carrier, and at the time of shipment Miller had technically agreed to this contractual limitation. While the limitation involved here is directed solely against the complainant who ever he might be.

Tennessee Law

It may be stated that one of the characteristics of an answer, or answer and counter-claim, is the fact that they follow, and never precede the service of process, thus are not confounded by jurisdictional prerequisite or statutes of limitations, when fully responsive to suits filed within time limits.

Tennessee statutes dealing with the commencement of suits is provided by Section 8571 of the Code.

> 8571. "Commencement of an action by suing out summons.—The suing out of a summons is the commencement of an action, within the meaning of this

Chapter, whether it be executed or not, if the action is duly prosecuted and continued by the issuance of alias process from term to term, or recommended within one year after the failure to execute."

The Court stated in the case of *Paducah and M. R. Co. v. Parks, 86 Tenn.* 554, 8 S.W. 842 as follows:

"Commencement of suit stops the running of the statute of limitations not only as to the original cause of action, but as to all matters of set-off available as a defense in a properly presented case."

Patton Tully Tran's Co. v. Turner, 269 F. 334, held:

"Filing of death claims in a suit for limitation of liability held the commencement of action within the meaning of the Statute of Limitation."

Cowan v. Donaldson, 32 S.W. 457, 95 Tenn. 322, held:

"A suit in equity is commenced so as to arrest the running of the statute of limitations from the date of filing bill. . . ."

Affirmative Relief on Counter-Claim

The Supreme Court of Tennessee has, without exception, held that a counter complainant is entitled to affirmative relief on a showing that the plaintiff's obligation to him is more than the amount the counter-claimant owes plaintiff wherein the suit and counter-claim grew out of the same transaction. Sec. 8772 of the Code of Tennessee.

8772. "Judgment for excess of set off, and all cost.—If the debt or demand offered in recoupment or set-off exceed the amount of the plaintiff's demand, such excess being found by the Court or jury, judgment shall be rendered against the plaintiff in favor of the defendant for such excess, and cost."

Sections 8745, 8746 and 8749 of the Tennessee Code apply to suits between resident and non-resident litigants.

Williams v. Lenoir, 67 Tenn. 395;

Dunn v. Bell, 85 Tenn. 581;
Paducah and M. R. Co. v. Parks, 86 Tenn. 554;
Harvey v. Campbell, 166 Tenn. 369.

In the case of *Dunn v. Bell,* 85 Tenn. 581 the Court stated:

> "The rule that the bringing of a suit saves from the operation of a statute of limitation all such claims of the defendant as are properly the subject of set off and which are in fact treated as set offs in this action. . . ."

In the case of *Harvey v. Campbell, Supra,* the Court stated:

> "Being of the opinion that the cross action was seasonably instituted under Section 8745 of the Code by reason of the provisions of Section 8816 of the Code. The defendant having pleaded set off or counter-claim was entitled to proceed on such counter-claim in the capacity of plaintiff, notwithstanding the original plaintiff had taken a non-suit." *Boone and Howison v. Bush,* 91 Tenn. 29; *Barns v. Noel,* 131 Tenn. 126.

Unless otherwise provided by statute, if a counter-claim or set off is not barred at the commencement of the action in which it is pleaded, it does not become so afterwards during the pendency of that action.

Denton v. Detweiler, 48 Idaho 369;
Concrete Steel Co. v. Reinforced Concrete Co., 72 S.W. 2d 118;
North Carolina Cotton Growers Ass'n v. Tiller, 201 N. C. 531;
Huggins v. Smitt, 141 Ark. 87;
Maryland Casualty Co. v. Sheaffer, 57 Calif. App. 573;
Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740.

In the above case of *Union Sugar Co. v. Hollister Estate Co.,* it was held that the filing of the complaint oper-

ated to suspend the running of the statute of limitation as to any kind of claim existing at that date in favor of the defendant and therefore, that a counter-claim was not barred by the fact that the time had run before it was pleaded and filed applied without distinction to counter-claim which might be employed to diminish or defeat plaintiff's claim by way of set off, only to the extent of such claim, but includes such that might result in the affirmative judgment to the defendant.

In the absence of Federal Acts to the contrary Federal Courts will be governed by state law, and particularly so in the instant case, since the above premise is included in the act involved.

Section 499o PACA

499(o) ". . . This chapter shall not abrogate or nullify any other Statute whether state or federal, dealing with the same subjects of this chapter; but it is intended that all statutes shall remain in full force and effect except insofar only as they are not inconsistent herewith or repugnant hereto."

In the case of *Erie R. Co. v. Tompkins,* 304 U. S. 822, the Court in overruling the holding in the case of *Swift v. Tyson* stated:

"Except in matters governed by the Federal Constitution or by acts of Congress the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts, and no clause in the Constitution purports to confer such power upon the federal courts."

In the case of *Hartford Accident and Indemnity Co. v. People of State of Illinois, ex rel McLaughlin,* 56 S.Ct. 685, 298 U. S. 155 the Court held:

> "This chapter did not nullify provisions of state law, regulating some business which required commission merchant to furnish bond, in view of failure of this chapter to require bond and provision of this section against nullification of any part of state statute consistent therewith."

In the case of *Guarantee Trust Co. v. York,* 326 U. S. 99 the Court held:

> "Force of substance is rights enforced by Federal Courts under diversity jurisdiction is the law of the State. Whenever that law is authoritatively declared by state whether by the legislature or its highest Court, such law ought to govern litigation founded on that law, whether the forum of the application is the state or Federal Court and whether the remedy be sought in law or may be had in equity."
>
> "A statute whether it is characterized, substantive or procedural that would completely bar recovery of a suit brought in a state court bears on a state created right vitally and not merely formally or negligibly, and as to consequencies so intimately affect recovery or non-recovery a Federal court as in a diversity case should follow the state law."

In the case of *Ernest E. Fadler Co. v. Hesser,* C. C. A. 10th Circuit, 166 Fed. 2d 904, it was held:

> "The Perishable Agricultural Commodities Act was not intended to repeal this law of sales or destroy the right or liabilities of contracting parties."

Citing Utah Statutes under Uniform Sales Act.

> "Seller impliedly warranted that vegetables shipped f.o.b. from Louisiana were merchandible not when they left Louisiana but when buyer, while the vegetables were in transit, accepted sellers offer manifest by

telegram by seller and ordering the shipment diverted buyer vendee in Salt Lake City."

Compare the case of *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d 539 wherein the Court stated in relation to the communication act.

> ". . . Congress having occupied the field by enacting a *fairly comprehensive scheme of regulations*, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of inter-state messages must be governed by uniform rules. This conclusion is justified by decisions under the Interstate Commerce Act." (Italics ours.)

Appellee insist that Rules 47.8(b) and 47.9 promulgated by the Secretary of Agriculture, providing for the filing of a counter-claim is not in any wise inconsistent with Section 499F of Title 7 U. S. C. A. In fact, Congress, in the passage of the Act, clearly intended that the word "answer" as used in Section 499F (a) should, when need be, include "counter-claim" upon which affirmative relief may be awarded and that the Tennessee Statute, Section 6768, 6772, 8745, 8746 and 8749 regarding set-offs and counter-claims are in no wise inconsistent with, or repugnant to, the Perishable Agricultural Commodities Act, Sections 499a to 499r.

Appeal

Section 499g(c) of Title 7 U. S. C. A. provides that either party may appeal to the District Court, said Section in brief is copied herein:

> "(c) Either party adversely affected by the entry of a reparation order by the Secretary may, in 30 days from and after the date of such order, appeal therefrom to the District Court of the United States for the district in which the hearing was held. . . . *Such suit in the District Court shall be a trial de novo and*

shall proceed in all respects like other civil suits for damages, except that the finding of fact and order or orders of the Secretary shall be *prima facia* evidence of the facts therein stated. Such petition and pleading certified by the Secretary upon which decision was made by him shall, upon filing in the District Court, *constitute the pleadings upon which said trial de novo* shall proceed subject to any *amendment allowed in that court.*" (Italics ours.)

Federal Rules

Appellant and Appellee perfected an appeal to the Federal District Court for the Middle District of Tennessee. For convenience the Federal Rules of Procedure pertinent hereto are set out in brief:

Title 28 Rule 13 U. S. C. A.

"(a) Compulsory Counterclaims. A pleading shall state as a counter-claim any claim which at the time of serving the pleading the pleader has against the opposing party, if it rises out of a transaction or occurrence that is the subject matter of the opposing parties claim. . . ."

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(e) Counterclaim Maturing or Required After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the Court, be presented as a counterclaim by supplemental pleading.

(f) "Omitted Counterclaim. When a pleader fails to set up a counter-claim to oversight, inadvertence, or excusable negligence, or when justice requires, he may by leave of court set up a counter-claim by amendment."

Rule 81(a) (4) 28 U. S. C. A. in brief is as follows:

> (4) "These rules do not alter the rule or the method prescribed by the Act . . . June 10, 1930. . . . As amended U. S. C. Title 7, Section 499g (c), for instituting proceedings in the United States District Court to review orders of the Secretary of Agriculture; . . . But the conduct of such proceedings in the District Court shall be made to conform to these rules so far as applicable."

The above rules of procedure became effective subsequent to the filing of the formal complaint in this cause and prior to an appeal to the Federal District Court. Before the passage of the New Federal Rules of Procedure, "Equity Rule 30," not inconsistent with the new rules, was in effect.

In Appellant's brief "Point B," it is insisted where a Governmental Agency interprets the law under which it acts and its own rules for a long period of time, a reviewing court should follow the interpretation unless contrary to the law and public policy.

The Court held in the case of *L. Gillarde Co. v. Joseph Martinalli and Co.*, 169 F. 2nd 60, (C. C. A. 1st Cir.) (cited in Appellant's Brief 25), the question involved was whether or not a purchaser under an f.o.b. contract, who had unlawfully rejected a car of cantaloupes, could recover from the shipper in the event the rejected car did not conform to the contract. The Court, in the first instance, held the purchaser could recover.

The Secretary as *amicas curi* joined in upon a petition to rehear insisting that the department had ruled the opposite for a period of ten years. The petition to rehear was granted the Court stating:

> "Under the circumstances we hold that we should

not substitute our interpretation merely because our original thought was that such a drastic interpretation is not needed to carry out the intent of the act. The department's *interpretation is not clearly erroneous; it is a possible and reasonable interpretation* of the regulations, even if not the only possible one. We therefore think it should be followed." (Italics ours.)

Appellant urges (Appellant's Brief 27) that jurisdiction of the District Court, not being dependent upon diversity of citizenship, the law of Tennessee should not govern. Citing several authorities including:

O'Brien v. Union Tel. Co. (supra) wherein the Court held the question involved was fully covered in the Federal Communications Act.

Dertrick v. Greaney, 309 U. S. 190, wherein the Court held that the National Bank Act was violated by respondent, thus the matter must be determined by Federal law.

D'Oench, etc. v. Federal Deposit Ins. Corp., 315 U. S. 447, involved a decision of a federal, not a state, question under the rule of Deitrick v. Greaney (supra).

The above cases are not in point, in view of the fact that the Federal Act concerned here specifically preserved the force and effect of all other statutes, both State and Federal, not inconsistent with the Perishable Agricultural Commodities Act.

Appellee submits that upon appeal to the Federal District Court the matter is to be tried *de novo,* on the same pleadings, unless amended, and proceed as any other civil action. Section 499F (c). In fact the purpose of the Act was to provide an additional simple remedy for the settlement of controversities, and without affecting the previous rights and liabilities of the contractng parties.

In the case of *Fletcher v. O'Zark Packing Co.,* 188 F. 2d 858, it was held:

> "This section was not intended to repeal the law of sales, or to destroy rights and liabilities of parties contracting under law of sales, and, in absence of applicable provision of this section or regulations pursuant thereto, general law of sales will govern."

Appellee submits that the parties involved herein are citizens of different states, the contract entered into was made in inter-state commerce. Wherefore, the Federal Courts would have jurisdiction, either by reason of the diversity of citizenship, or by virtue of Title 7-499a to 499r. The choosing of the one remedy, or of the other, did not affect the location of the forum or the applicable law therein, such being specifically preserved by the Act. Section 499o.

Conclusion

Appellee insists that the interpretation of the Secretary of Agriculture is clearly erroneous:

1. In holding that Section 499F(a) required an answer containing a counter-claim be filed within nine months of the time the action accrued, although the Secretary, under the direction of the statute, fixed the time for filing answer and counter-claim at 20 days after the service of the complaint on Respondent.

2. In holding that Appellee's counter-claim filed in response to the complaint could not recover affirmative relief, although Section 499F(e) of the Act plainly states affirmative relief may be had under a counter-claim.

3. In holding indirectly that the term "counter-claim" was synonymous with "recoupment," although "counter-claim" is generally, usually and legally defined as pleading upon which affirmative relief may be had.

4. In holding under Section 499F(a) that it was

the intent of said section that a "counter-claim" must be filed within the 9 months period required of an original complaint, although the Act in plain easy language provides that the time of filing an answer be fixed by the Secretary.

5. In failing to hold that, by the filing of the original complaint, the jurisdictional prerequisite of the Act was met for all purposes.

6. In failing to hold that "Petition" or "Complaint" is a primary pleading and "Answer and Counter-claim" is a responsive pleading."

Appellee insists that Appellants selected the forum for the determination of this matter, and that upon appeal to the District Court to be tried *de novo* all of the federal rules and regulations, all of the Tennessee Statutes and holdings applicable, but not inconsistent with the Perishable Agricultural Commodities Act, became part of the rule and guide for the determination of this controversy.

That under our whole system of jurisprudence, through legislative enactment and common law, the Courts have sought to reach the entire merits of a controversy in a single action. Wherefore, Appellee respectfully submits that the grounds advanced by Appellant for certiorari are not well taken. Wherefore, its certiorari should be denied.

Respectfully submitted,

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